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Nos. 90-1262 and 90-1266

In the Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF ARKANSAS, ET AL.,
Petitioners,
v.
STATE OF OKLAHOMA, ET AL.

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,
v.
STATE OF OKLAHOMA, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE NATURAL RESOURCES DEFENSE COUNCIL, THE ENVIRONMENTAL DEFENSE FUND, THE NATIONAL WILDLIFE FEDERATION, AND AMERICAN RIVERS, INC. IN SUPPORT OF RESPONDENTS

MELINDA KASSEN
ENVIRONMENTAL DEFENSE FUND
1405 Arapahoe
Boulder, CO 80302
(303) 440-4901
Counsel for EDF

JESSICA C. LANDMAN
Counsel of Record
KIMI A. MATSUMOTO
NATURAL RESOURCES DEFENSE COUNCIL
1350 New York Ave., N.W.
Washington, D.C. 20005
(202) 783-7800
Counsel for NRDC

MARK VAN PUTTEN
NATIONAL WILDLIFE FEDERATION
802 Monroe Street
Ann Arbor, MI 48104
(313) 769-3351
Counsel for NWF

JOHN ECHEVERRIA
AMERICAN RIVERS, INC.
801 Pennsylvania Ave., S.E.
Washington, D.C. 20003
(202) 547-6900
Counsel for American Rivers

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Clean Water Act permits the discharge of pollutants into an interstate waterway in an upstream State where that discharge will cause a violation of federally-approved water quality standards in a downstream State.

2. Whether, in issuing a discharge permit in an upstream State, the Environmental Protection Agency (EPA) may undermine a downstream State's federally-approved water quality standards by means of an interpretation contrary to the plain language of those standards.

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INTEREST OF AMICI

The Natural Resources Defense Council, Inc. (NRDC) is a nonprofit organization representing over 113,000 members nationwide. NRDC and its members are dedicated to the protection of human health and the preservation, enhancement and defense of the natural resources of the United States, including U.S. rivers, streams, lakes and coastal wa-

ters. For nearly two decades NRDC has operated a Project on Clean Water to promote the reduction and ultimate elimination of the discharge of pollutants into U.S. waters.

The Environmental Defense Fund (EDF) is a national, not-for-profit organization with over 200,000 members dedicated to the protection of public health and the environment. Since its creation in 1969, EDF's staff of scientists, economists and attorneys has participated in administrative, legislative and judicial fora to encourage decision makers to adopt policies and practices that make wise use of natural resources and minimize pollution. EDF is presently engaged in legal and administrative actions to require the federal and state governments to promulgate more protective water quality standards and to enforce such standards in a manner that more effectively protects the nation's precious aquatic ecosystems.

The National Wildlife Federation (NWF) is the nation's largest, not-for-profit conservation education organization with approximately 5.6 million members and supporters. NWF has 53 state and territorial affiliated organizations, one of which—the Oklahoma Wildlife Federation—is a party to this proceeding. NWF and its members are dedicated to the wise management of the nation's natural resources, including its lakes and rivers. To that end, NWF's staff have worked at the federal, regional, state and local level to encourage full implementation of the Clean Water Act.

American Rivers, Inc. is a nonprofit conservation organization dedicated to the protection and restoration of America's rivers. With over 15,000 members,

American Rivers is the largest national conservation organization dedicated exclusively to river conservation. American Rivers actively works to strengthen and expand state scenic river and other types of state-level river protection programs.

As national environmental organizations, amici have a special interest in the two issues in this case, the resolution of which will significantly affect the quality of water nationwide. First, if EPA-approved state water quality standards are not enforceable against discharges originating across state borders, those standards would be badly undermined. Downstream States, contrary to the express intent of the Clean Water Act, would have no control over the influx of pollutants from sources that could be located strategically on the borders of upstream States. Second, amici are actively concerned with ensuring that the Environmental Protection Agency (EPA) faithfully enforces federally-approved state water quality standards when issuing discharge permits. The language and intent of the Clean Water Act would be frustrated if EPA, through "interpretation," could ignore the express language of a downstream State's federally-approved water quality standards.

SUMMARY OF ARGUMENT

Arkansas and its amici attempt to turn this case into a policy debate concerning the relative rights of upstream and downstream States. But the relevant policy issues have already been resolved by Congress. This case turns on plain language, the plain language of the Clean Water Act, which requires upstream discharges to satisfy the federally-approved water quality standards of downstream States, and the

plain language of Oklahoma's federally-approved water quality standards, which forbid any further discharge of pollutants into designated "scenic rivers" such as the Illinois River.

1. The Clean Water Act prohibits the discharge of any pollutant into the waters of the United States except when authorized by a permit. 33 U.S.C. 1311(a). Section 401(a)(2) of the Clean Water Act, 33 U.S.C. 1341(a)(2) (emphasis added), provides:

> Whenever * * * a discharge may affect, as determined by the [EPA] Administrator, the quality of the waters of any other State, the Administrator * * * *shall* so notify such other State * * * If * * * such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and * * * notifies the Administrator * * * and requests a public hearing * * *, the licensing or permitting agency *shall* hold such a hearing. * * * [The licensing or permitting] agency, based upon the recommendations of such State, * * * *shall* condition such license or permit in such matter as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency *shall not* issue such license or permit.

This provision makes it absolutely clear that a permit "shall not issue" unless it complies with the water quality requirements of any State whose waters will be affected by the proposed discharge. Whenever EPA determines that a discharge might affect water quality in another State, it *must* notify that State. If the notified State determines that the discharge will violate its water quality requirements,

EPA *must* (if the State requests) hold a hearing pursuant to 33 U.S.C. 1342(a), to consider the State's objections. If EPA decides to grant the permit, it *must* impose whatever conditions are "necessary to *insure* compliance with applicable water quality requirements." And if EPA cannot insure such compliance, then it *must* deny the permit.

Not only does the Clean Water Act itself require a permitting authority to determine whether a downstream State's water quality standards will be violated, EPA's implementing regulations do so as well. For example, 40 C.F.R. 122.4(d) (emphasis added) expressly provides: "No permit may be issued * * * [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of *all affected States*." To the same effect, EPA's rules require permits to include, where applicable, "any requirements * * * necessary to * * * [c]onform to applicable water quality requirements * * * when the discharge affects a State other than the certifying State [*i.e.*, the State in which the discharge will be located]." 40 C.F.R. 122.44(d)(4). Thus, even if the Clean Water Act itself were ambiguous on this issue—which it plainly is not—the Court would be required to accord deference to the consistent interpretation of the statute by the agency entrusted with its administration.

2. Under Oklahoma's federally-approved water quality standards, as they appeared at the time of Arkansas' permit application, Oklahoma's rivers "are protected by prohibition of any new point source discharge of wastes or increased load from an existing point source except under conditions described in Section 3." Oklahoma Water Quality Standards § 5

(1982) (J.A. at 46). Section 3 is the State's "Anti-Degradation Policy." In certain circumstances, it permits "lower water quality as a result of necessary and justifiable economic or social development" (J.A. 28). But the provision is quite clear that "[n]o degradation shall be allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreation or ecological significance. These include water bodies * * * designated [as] 'Scenic Rivers'" (*ibid.*). Thus, for scenic rivers, no exception is made by Section 3 to Section 5's otherwise absolute "prohibition of *any* new point source discharge of wastes." J.A. 46 (emphasis added). Oklahoma's water quality standards unambiguously forbid any new discharge of wastes into a scenic river.

It is undisputed that the Illinois River has been properly designated as a "scenic river." It is also undisputed that the permit at issue here would lead to the "discharge of wastes" into the Illinois River from "a new point source." It therefore follows that the permit is unlawful under the plain terms of Oklahoma's federally-approved water quality standards. EPA had no discretion to ignore those standards—through "interpretation" or otherwise—in the permit approval process.

In place of Oklahoma's clear directive, EPA proposes a much more imprecise standard: whether the discharge will have a "detectable impact on current water quality in the protected waters" (EPA Br. at 22). This replacement is altogether too fluid a standard to fairly reflect Oklahoma's "zero-discharge" policy. Oklahoma has said "no discharge of wastes into scenic rivers," and it plainly meant *no discharge of wastes*, not "some discharge" or "only a little." That is a policy choice that, under the Clean Water Act, Oklahoma was entitled to make and EPA, having reviewed and approved Oklahoma's water quality standards, must now enforce.

ARGUMENT

I. THE CLEAN WATER ACT REQUIRES DISCHARGES IN AN UPSTREAM STATE TO COMPLY WITH "APPLICABLE WATER QUALITY REQUIREMENTS," INCLUDING THE FEDERALLY-APPROVED WATER QUALITY STANDARDS OF AN AFFECTED DOWNSTREAM STATE

The Clean Water Act contemplates a partnership between the federal government and the States "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). In the Act, Congress chose two mechanisms—one initiated by the federal government, the other by individual States—to ensure the reduction and eventual elimination of the discharge of pollutants. 33 U.S.C. 1251(a). First, the Administrator of EPA is charged with developing and promulgating uniform national technology-based standards, known as "effluent limitations guidelines," that all discharges into navigable waters—intrastate and interstate—must satisfy. 33 U.S.C. 1311 and 1314. Second, individual States are required to adopt water quality standards to assure protection of the waters within or flowing through those States. 33 U.S.C. 1313(a), (b) & (c)(1). These standards normally specify minimum concentrations of certain pollutants that must be achieved in state waters and narrative requirements such as the Oklahoma "antidegradation" rule at issue in this case. Where achieving these

standards in any body of water requires controls on a given source more restrictive than required by the national effluent limitations guidelines, the Act mandates imposition of such controls. 33 U.S.C. 1311 (b)(1)(C). The States are required to submit their water quality standards to EPA for review and approval. But, upon approval by EPA, a state-adopted water quality standard "shall thereafter be the water quality standard for the applicable water of that State." 33 U.S.C. 1313(c)(3).

The statute, therefore, establishes a federal floor for all discharges and permits individual States to designate uses for particular waters within those States such that compliance with the water quality standards needed to protect those uses may require more stringent limitations on discharges. There is obviously a basic dilemma created by such a scheme, which is how to treat interstate waterways. An upstream State has the practical ability to control the quality of interstate waters by setting and enforcing its own water quality standards and releasing water of that quality. If the upstream State's water quality standards are lower than those considered desirable by a downstream State, so will be the actual quality of the water flowing into the downstream State. "In other words," as the Court of Appeals noted, "the lowest common denominator will prevail." EPA Pet. App. 14a. By contrast, if the higher standards of a downstream State are applied to discharges originating in an upstream State, then the upstream State will be required to adapt to those higher standards.

Arkansas and its various amici accordingly state the initial question presented in this case in terms of

a fundamental policy dilemma: Should the downstream State be forced to accept waters polluted by an upstream State, or should the upstream State be forced to adapt itself to the environmental aspirations of the downstream State? Policy arguments could indeed be made in favor of either answer. But Congress has already made its policy choice in the Clean Water Act.

Section 401(a)(2), 33 U.S.C. 1341(a)(2), expressly provides that EPA "shall not issue" a permit to allow a discharge of pollutants in an upstream State if "such discharge will affect the quality of [another State's] waters so as to violate any water quality requirement in such State * * *." That mandate is reinforced by several other sections of the Clean Water Act as well as a number of EPA regulations implementing the Act. All of these provisions clearly establish that a source in an upstream State may not discharge pollutants into an interstate waterway where that discharge will cause a violation of the federally-approved water quality standards of a downstream State.

A. The Plain Language Of The Clean Water Act And EPA Regulations Promulgated Pursuant To That Act Forbid Issuance Of A Discharge Permit In An Upstream State That Will Cause A Violation Of The Federally-Approved Water Quality Standards Of A Downstream State

In order to achieve and enforce both federal effluent limitations guidelines and state water quality standards, the Clean Water Act established the "national pollutant discharge elimination system" (NPDES) permit program. 33 U.S.C. 1342. The Act prohibits the discharge of any pollutant into the waters of the United States except when authorized

by an NPDES permit. 33 U.S.C. 1311(a). And, most importantly for purposes of this case, the Act prohibits EPA from issuing a permit for a discharge in one State that will cause a violation of the water quality standards of another State.[1]

Section 401(a)(2) of the Clean Water Act, 33 U.S.C. 1341(a)(2) (emphasis added), provides:

> Whenever * * * a discharge may affect, as determined by the [EPA] Administrator, the quality of the waters of any other State, the Administrator * * * *shall* so notify such other State. * * * If * * * such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and * * * notifies the Administrator * * * and requests a public hearing * * *, the licensing or permitting agency *shall* hold such a hearing. * * * [The licensing or permitting] agency, based upon the recommendations of such State, * * * *shall* condition such license or permit in such matter as may be *necessary to insure compliance* with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency *shall not* issue such license or permit.

This provision, which bristles with imperatives, makes it absolutely clear that a permit "shall not

[1] The Act provides that EPA will issue NPDES permits except in those States where EPA has approved a state permit program pursuant to 33 U.S.C. 1342(b). At the time that Fayetteville sought the permit at issue here, Arkansas did not have an approved permit program. EPA was thus the permitting agency. As noted below, however, the water quality standards of Oklahoma would have been equally applicable had Arkansas been the permitting authority.

issue" unless it complies with the water quality requirements of any State whose waters will be affected by the proposed discharge. Whenever EPA determines that a discharge might affect water quality in another State, it *must* notify that State. If the notified State determines that the discharge will violate its water quality requirements, EPA *must* (if the State requests, hold a hearing pursuant to 33 U.S.C. 1342(a), to consider the State's objections. If EPA decides to grant the permit, it *must* impose whatever conditions are "necessary to *insure* compliance with applicable water quality requirements." And if EPA cannot insure such compliance, then it *must* deny the permit.

It is impossible to escape this plain language. Arkansas' suggestion (Br. at 16) that the phrase "applicable water quality requirements" in Section 401(a)(2) refers only to the water quality standards of the source State is simply absurd. Subparagraph 1 of Section 401(a)—which provides that no NPDES permit may be granted until a "certification" is obtained from the State in which the discharge originates stating that the discharge will comply with applicable water quality requirements—already ensures that the water quality standards of the source State will be met. The whole purpose of subparagraph 2 of that section is to enable other affected States to ensure that their water quality will not be jeopardized by the proposed discharge.

Given that Section 401(a)(2) deals expressly with effects on States other than the source State, the word "applicable" can only refer to those federally-approved water quality requirements of any downstream State that will receive pollutants discharged

in the source State. As EPA itself explains, "[b]efore issuing a permit authorizing discharges into an interstate waterway, EPA *must* determine that the proposed permit will meet all applicable requirements of the Act and implementing regulations, *including compliance with federally approved water quality standards of the receiving State.*" EPA Br. at 14 (emphasis added). See also *ibid.* (emphasis added) (noting that the issue in the case is whether EPA "reasonably interpreted and applied *applicable Oklahoma water quality standards*").

The federally-approved water quality standards of the downstream State are also binding upon discharges in an upstream State where the upstream State is the permitting authority. In those States with approved permit programs, the source, or permit-issuing, State must notify all other States, "the waters of which may be affected," of a permit application contemplating such discharges. 33 U.S.C. 1342(b)(3). Each potentially affected State must then be afforded an opportunity to "submit written recommendations to the permitting State" and to EPA regarding the application. 33 U.S.C. 1342 (b)(5). If any part of those recommendations is not accepted by the permitting State, that State must notify the affected State and EPA. 33 U.S.C. 1342 (b)(5).

The permitting State must then submit to EPA a copy of each proposed permit involving an interstate waterway before it may be issued. 33 U.S.C. 1342 (d)(1) and (2); 40 C.F.R. 123.24(d). If EPA determines that issuance of the permit would be "outside the guidelines and requirements" of the Act then "[n]o permit shall issue." 33 U.S.C. 1342(d)(2). Since a permit that will cause violations of the federally-approved water quality standards of a downstream State is "outside the guidelines and requirements" of the Act, such a permit may not be issued.

The paragraph immediately following this veto provision, 33 U.S.C. 1342(d)(3), states that "[t]he [EPA] Administrator may, as to any permit application, waive paragraph (2) of this subsection." But EPA's discretion arises only with respect to its authority to choose to review or not review a permit application of which it is notified by a permit-issuing State pursuant to 33 U.S.C. 1342(d)(1). Once EPA chooses to review a proposed permit under this section, it does not have "discretion" to overlook a violation of the federally-approved water quality standards of a downstream State. See EPA Pet. App. at 37a-38a n.19; *Mianus River Preservation Comm.* v. *Administrator, EPA*, 541 F.2d 899, 907-09 (2d Cir. 1976).

Not only does the Clean Water Act itself require a permitting authority to determine whether a downstream State's water quality standards will be violated, EPA's implementing regulations do so as well. For example, 40 C.F.R. 122.4(d) (emphasis added) expressly provides: "No permit may be issued * * * [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of *all affected States.*" To the same effect, EPA's rules require permits to include, where applicable, "any requirements * * * necessary to * * * [c]onform to applicable water quality requirements * * * when the discharge affects a State other than the certifying State [*i.e.*, the State in which the discharge will be located]." 40 C.F.R. 122.44(d)(4).

Thus, even if the Clean Water Act itself were ambiguous on this issue—which it plainly is not—the

Court would be required to accord deference to the consistent interpretation of the statute by the agency entrusted with its administration. See, *e.g.*, *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981); cf. *E.I. DuPont De Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.25 (1977) (EPA interpretation entitled to deference, even if not contemporaneous with enactment of CWA, in light of technical nature of statute, agency's expertise, and ambiguous statutory language).

B. The Policies Of The Clean Water Act And Applicable Case Law Confirm That An Upstream State May Not Discharge Pollutants Into An Interstate Waterway That Will Violate The Federally-Approved Water Quality Standards Of A Downstream State

Arkansas and its various amici, in arguing that the source State may completely ignore the federally-approved water quality standards of affected downstream States, never come to grips with the precise language of the Clean Water Act. Instead, they indulge in a hodgepodge of policy arguments and rely heavily on dicta ripped from prior cases. Neither of these sources, however, is sufficient to counteract the plain terms of the statute and EPA's implementing regulations. Moreover, none of the arguments based on these sources is convincing even on its own terms.

The goal of the Clean Water Act is stated clearly in one of its opening provisions: the "prevention, reduction, and elimination of pollution" in the Nation's waters. 33 U.S.C. 1251(b). The Act devised a two-step process to achieve that goal. The first step was to improve water quality sufficiently for the

"protection and propagation of fish, shellfish, and wildlife and * * * for recreation in and on the water." 33 U.S.C. 1251(a)(2). The second step, and ultimate goal, is the *total elimination* of discharged pollutants. 33 U.S.C. 1251(a)(1).

This goal is obviously ambitious and far from achieved. But the rest of the Act must still be read in light of that lofty aspiration. Arkansas' contention that all discharging States should be able to set and indefinitely maintain pollutant levels at the federally-mandated minimum acceptable level thus seriously misunderstands the fundamental purpose of the Clean Water Act. It is clearly the intention of the Act to encourage individual States to adopt water quality standards stricter than the federal minimum. Allowing upstream dischargers to expel effluents at a level which achieves only the minimum requirement on interstate waterways would effectively negate the higher standards of downstream States.

Section 301(b)(1)(C) of the Act, 33 U.S.C. 1311(b)(1)(C) (emphasis added), provides:

> In order to carry out the objectives of [the Act] there *shall be achieved* not later than July 1, 1977, *any* more stringent limitations, including those necessary to meet water quality standards * * * established pursuant to *any* State law or regulations * * * or required to implement *any* applicable water quality standard established pursuant to this chapter.

In order to ensure that the EPA-approved water quality standards in all States are "achieved," it is obviously "necessary" to require dischargers to meet the applicable requirements of other affected States as well as those of the source State. There could be

no assurance of achieving a downstream State's more stringent water quality standards if an upstream, out-of-state discharger were not required to comply with those standards. As EPA explained below, Arkansas' construction of the Act would make achieving downstream water quality standards "impossible in many circumstances or * * * possible * * * only by imposing a disproportionate burden on dischargers located in the downstream state." EPA Br. at 21 (cited in EPA Pet. App. at 25a).

Faced with a choice between two possibilities—upstream States dragging others down to their minimum standards and downstream States pulling others up to their higher standards—Congress plainly, and sensibly, chose the latter. This is not to say that the downstream State "imposes" its standards on the upstream State, but rather that the Clean Water Act mandates compliance with federal law, including the federally-approved water quality standards of affected States. Any standard or limitation adopted by a State and approved by EPA becomes the "water quality standard for the applicable waters of that State," and thus is federally enforceable. 33 U.S.C. 1313(c)(3). See also 33 U.S.C. 1319, 1342.[2]

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[2] Arkansas and its amici attempt to raise Commerce Clause and even Tenth Amendment concerns around the assertion that Oklahoma is attempting to "extend its regulatory authority into another state." Arkansas Br. at 31 n.44. See also Brief of Mountain States Legal Foundation at 15-20; Brief of Colorado Water Congress, et al. at 19. Aside from the fact that these issues were never raised or decided below, the arguments are frivolous. Once Oklahoma's standards are approved by EPA, they become federally-enforceable under the Clean Water Act and thus are properly applied to limit discharges in another State sharing the same waterway.

Congress was far more concerned that upstream States would become "pollution havens" than that downstream States would be unrealistically strict in their standards. Indeed, with a stated aspiration of "permitting no discharge of pollutants" (33 U.S.C. 1316(a)(1)), Congress did not concede that any standards could be too strict. But it did clearly recognize the danger that rewarding sources for locating in States with less stringent water quality requirements (by relieving them from complying with more stringent downstream water quality standards) would result in "pollution shopping."[3] A source located immediately above a state boundary would not be required to meet the more stringent requirements, if any, of the downstream State, even though that State may be most affected by the discharge. The Administrative Law Judge in the instant case expressed precisely this concern, stating that interpretations of the Clean Water Act that did not enforce the stricter downstream standards "would allow a source to locate its discharge just across the line in Arkansas and freely violate Oklahoma standards. Such a result is contrary to the [Clean Water Act], regulations and Court decisions." Decision on Remand, R., A-33, at 4-5 (quoted in EPA Pet. App. at 19a).

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[3] When it amended Section 402 of the Act in 1977 to authorize EPA to issue an NPDES permit where it determines a state-issued permit is inadequate, the Senate committee stated: "EPA has been much too hesitant to take any actions where States have approved permit programs. The result might well be the creation of pollution havens in some of those States which have approved permit programs. This result is exactly what the 1972 amendments were designed to avoid." S. Rep. No. 370, 95th Cong. 1st Sess. at 73, *reprinted in* 1977 U.S. Code Cong. & Admin. News 4326, 4398.

Arkansas and all of its amici cite *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), in support of their construction argument, but that reliance is misplaced. In that case an affected State was seeking to enjoin an ongoing discharge in another State by resort to its own state law nuisance remedies. *Id.* at 483. In contrast, this case is a permitting, rather than an enforcement, action wherein Oklahoma seeks simply to ensure compliance with federal law, *i.e.*, its EPA-approved water quality standards.[4]

The specific issue in *Ouellette* was whether the Clean Water Act preempts a common law nuisance suit filed in a Vermont court under Vermont law against a New York discharger. The Court simply concluded that "Vermont nuisance law is inapplicable to a New York point source," 479 U.S. at 497. The Court noted that "[i]t would be extraordinary for Congress, after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure." *Ibid.* But the Court stressed that nothing in its decision affected the plaintiff's right to "pursue remedies that may be provided by the Act." *Id.* at 498 n.18. Plainly, *Ouellette* was concerned not with the Clean Water Act's provision for incorporating a downstream State's water quality standards in the permitting process, but with preventing a downstream State from circumventing or superceding the process by imposing on an already-permitted source additional requirements based on its own state law.

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[4] *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), and other cases relied on by Arkansas and its amici are distinguishable on the same grounds.

The only cases actually discussing the precise question at issue here state that the Clean Water Act prohibits interstate violation of federally-approved water quality standards. For example, in *Montgomery Envt'l Coalition* v. *Costle*, 646 F.2d 568, 594 n.21 (D.C. Cir. 1980), the D.C. Circuit noted that downstream States can block permits until discharging States comply with the mandated water quality standards. And in *Lake Erie Alliance for the Protection of the Coastal Corridor* v. *U.S. Army Corps of Eng'rs*, 526 F.Supp. 1063, 1075 (W.D.Pa. 1981), aff'd without opinion, 707 F.2d 1392 (3d Cir.), cert. denied, 464 U.S. 915 (1983), the Court noted that the notice requirement in 33 U.S.C. 1341(a)(2) was designed "to enable a state whose water qualities may be affected by the proposed federal activity an opportunity to insure that its standards will be complied with."

II. THE PERMIT AT ISSUE IN THIS CASE WOULD VIOLATE OKLAHOMA'S FEDERALLY-APPROVED WATER QUALITY STANDARDS, WHICH UNAMBIGUOUSLY FORBID THE DISCHARGE OF ADDITIONAL POLLUTANTS INTO THE ILLINOIS RIVER

Under Oklahoma's federally-approved water quality standards, as they appeared at the time of Arkansas' permit application, Oklahoma's rivers "are protected by prohibition of any new point source discharge of wastes or increased load from an existing point source except under conditions described in Section 3." Oklahoma Water Quality Standards § 5 (1982) (J.A. at 46). Section 3 is the State's "Anti-Degradation Policy." In certain circumstances, it permits "lower water quality as a result of necessary and justifiable economic or social development" (J.A. 28). But the provision is quite clear that "[n]o

degradation shall be allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance. These include water bodies * * * designated [as] 'Scenic Rivers' " (*ibid.*). Thus, for scenic rivers, no exception is made by Section 3 to Section 5's otherwise absolute "prohibition of *any* new point source discharge of wastes." J.A. 46 (emphasis added). Oklahoma's water quality standards unambiguously forbid any new discharge of wastes into a scenic river.

It is undisputed that the Illinois River has been properly designated as a "scenic river." [5] It is also undisputed that the permit at issue here would lead to the "discharge of wastes" into the Illinois River from a "a new point source." [6] It therefore follows that the permit is unlawful under the plain terms of Oklahoma's federally-approved water quality standards. EPA had no discretion to ignore those standards—through "interpretation" or otherwise—in the permit approval process.

The Clean Water Act creates a unique federal-state partnership. The States promulgate water quality standards, and EPA reviews, approves, and helps to enforce those standards. Within this part-

[5] Oklahoma vigorously enforces its "no discharge" policy against all sources potentially affecting the Illinois River, whether in-state or out-of-state. Accordingly, as EPA notes (Br. at 19 n.23), no issue is raised in this case concerning the efficacy of a water quality standard that "has a discriminatory impact on out-of-state dischargers."

[6] For example, the ALJ estimated that 6 pounds of phosphorous alone would reach the Oklahoma border each day based on the Fayetteville plant's maximum allowable discharge of 3.5 million gallons of effluents daily. Ark. Pet. App. 129a.

nership, however, Congress sought to "preserve and protect the primary responsibilities and rights of states to prevent, reduce and eliminate pollution [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. 1251(b).[7] The approval process does not grant EPA a license to water down the standards promulgated by a State through an "interpretation" completely at odds with the plain language of those standards.

This is not to say, as Arkansas contends (Br. at 27), that federal review consists merely of an automatic approval. EPA must determine whether the proposed water quality standards are "consistent with the requirements of the Act." 33 U.S.C. 1313 (a). EPA's regulations require States to specify "the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses." 40 C.F.R. 131.2. And EPA reviews the scientific validity of those criteria in order to determine whether they support the designated beneficial uses. See *Mississippi Comm'n on Natural Resources* v. *Costle*, 625 F.2d 1269, 1276 (5th Cir.

[7] This provision preserves States' roles so long as their standards and programs are consistent with, *i.e.*, at least as strict as, the Act. Senator Muskie, the Senate floor manager and one of the principal architects of the Clean Water Act, explained in colloquy that deference to the States under section 101(b) applies only so long as State actions are consistent with the goals and objectives of the Act. House Committee on Public Works, Water Pollution Control Act Amendments of 1972, H.R. 11896, 93rd Cong., 1st Sess., *reprinted in* 2, Legislative History of the Water Pollution Control Act Amendments of 1972, at 1315 (1972); see also *id.* Vol. 1 at 245-246 (statement of Rep. Harsha).

1980) (EPA may "require states to justify standards not in conformance with the criteria policy").[8]

It is clear, however, that the Administrator cannot reject a State's water quality standard solely on the grounds that it is too strict. As EPA itself has acknowledged, the Agency is not authorized "to disapprove a State water quality standard on the basis that EPA considers the standard to be too stringent." 54 Fed. Reg. 39,099 (Sept. 22, 1989). See also, *e.g.*, *Mianus River Preservation Comm.* v. *EPA*, 541 F.2d 899 (2d Cir. 1976); *Homestake Mining Co.* v. *EPA*, 477 F. Supp. 1279 (D.S.D. 1979). Oklahoma has adopted a strict "zero-discharge" policy for its scenic rivers. Just as EPA could not disapprove that policy on the grounds that it was too strict so, too, EPA cannot transform that policy, through "interpretation," into something less strict.

EPA argues against a "zero-discharge" requirement on policy grounds. See EPA Br. at 28-29. But EPA never comes to grips with the operative language of Section 5, which establishes just such a requirement. Moreover, EPA completely ignores the fact that Oklahoma's "zero-discharge" policy is fully in keeping with the stated goal of the Clean Water Act, which is not just to reduce, but actually to "eliminate," pollution. 33 U.S.C. 1251(b).[9]

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[8] In evaluating state water quality standards EPA discourages state-wide, uniform water quality standards, noting that "blanket application of the criteria to all waters under all circumstances may not always be prudent or reasonable." *EPA Guidance for State Implementation of Water Quality Standards*, Env't Rep., Federal Laws (BNA) § 21, at 4623 (Dec. 12, 1988).

[9] Congress, in Section 303(d)(4)(B) of the Act, 33 U.S.C. 1313(d)(4)(B), expressly recognized the validity of an "anti-degradation" policy when it provided that, in situations where meeting state water quality standards requires technology beyond the industrial effluent limits attainable through the best available technology specified by EPA, neither a State nor EPA may revise a permit limit or other water quality standard unless "such revision is subject to and consistent with the antidegradation policy."

EPA's position is particularly remarkable in light of the fact that EPA itself interpreted its "model" antidegradation regulation (40 C.F.R. 35.1550(e)(2))—the very regulation EPA claims (EPA Br. at 23 n.27) Oklahoma followed in developing its water quality standards—as embodying a "zero-discharge" policy. In a 1979 Memorandum on Outstanding National Resource Waters (ONRW), EPA's Office of the General Counsel explained:

> We are not sure why *any* water quality standard would be necessary for an ONRW, since the standard is *no* degradation; it would seem that arguments over *x* or *y* micrograms per cubic meter would be irrelevant. Whenever a new point source applied for a permit to discharge into an ONRW, we could simply deny the permit (or force the State to deny the permit through our veto power) under § 301(b)(1)(C), which requires compliance with all State laws.

Memorandum from James Rogers, Associate General Counsel, Water and Solid Waste Division, to Kenneth M. Mackenthun, Director, Criteria and Standards Division (Aug. 15, 1979).

EPA thus manifested its understanding that the "Tier 3 antidegradation standard" applicable to outstanding natural resource waters was, in fact, a "zero-discharge" requirement. And as recently as

June, 1991, EPA recognized that Oklahoma's federally-approved water quality standards embody a "zero-discharge" requirement for an ONRW such as the Illinois River. "Oklahoma," EPA explained, "currently maintains a strict antidegradation policy. * * * Requirements for Tier 3 waters, ONRW's, are implemented by allowing *no new point source discharges and no increased loading and concentration in existing permits.*" Diamond, William R., Director, Standards & Applied Sciences Division, *Newsletter: Water Quality Criteria & Standards* at 5 (June 1991) (emphasis added).[10] Thus, at the very same time it was preparing its brief in this case—offering one interpretation of Oklahoma's water quality standards for litigation purposes—EPA was offering a completely different interpretation of those standards in its official newsletter on water quality standards.

In place of Oklahoma's clear directive, EPA in this litigation proposes a much more imprecise standard: whether the discharge will have a "detectable impact on current water quality in the protected waters" (EPA Br. at 22). This replacement is altogether too fluid a standard to fairly reflect Oklahoma's "zero-discharge" policy.[11] Oklahoma has said "no discharge

[10] Copies of this EPA newsletter have been filed with the Clerk of the Court and served on counsel for petitioners.

[11] Because EPA's "interpretation" is contrary to the plain language of Oklahoma's water quality standards, the Court need not even reach EPA's contention that EPA's interpretation of state-promulgated standards is entitled to the same deference that would be accorded EPA's interpretation of its own regulations. See EPA Br. at 20-21. In any event, that argument is highly questionable in light of Congress' explicit recognition of the "primary responsibilities and rights of states" to establish their own water quality standards (33

of wastes into scenic rivers," and it plainly meant *no discharge of wastes*, not "some discharge" or "only a little."

EPA's proposed standard raises the inherently imprecise, even subjective, question of when a discharge of pollutants is serious enough to cause a "detectable" worsening of water quality. Oklahoma avoids this uncertain morass by stating clearly that *any* additional discharge of pollutants is too much in a designated scenic river.[12] That is a policy choice that EPA is not permitted, under the Clean Water Act, to reject, whether by disapproving Oklahoma's standard *ab initio* or by "interpreting" it away.

Defining a prohibition in terms of precise amounts of pollutants discharged, as opposed to a more uncertain and subjective focus on a change in water quality, is standard practice in environmental law. Courts have uniformly supported enforcement of discharge restrictions without an explicit showing of actual injury to the waters in question.[13] EPA itself, in argu-

U.S.C. 1251(b)) and in light of the fact that EPA has no authority to disapprove state standards on the grounds that they are too strict.

[12] It is ironic, therefore, that EPA (Br. at 28) criticizes Oklahoma's standard as creating "practical difficulties * * * of implementation." Oklahoma's standard is a model of clarity and simplicity compared with the alternative proposed by EPA. Indeed, the imprecision and uncertainty that would be introduced by accepting EPA's alternative standard is clear from EPA's own admission (Br. at 24) that it "has not attempted to prescribe general standards for determining what constitutes a 'lowering' of water quality."

[13] See, *e.g.*, *Chevron, USA* v. *Yost*, 919 F.2d 27 (5th Cir. 1990) (discharging foreign substance violates the Clean Water Act without a showing of actual injury); *PIRG* v. *Powell*

ing for penalties to be imposed against violators of the Clean Water Act, has recognized that "all pollutants introduced into the environment create some harm or risk, * * * and it will be difficult in many cases to precisely quantify the harm or risk caused by the violation in question." *EPA Civil Penalty Policy* at 10 (July 8, 1980). The State of Oklahoma has also recognized this risk and found it unacceptable where scenic rivers are concerned. Accordingly, it has resolved to "prohibit[] any new point source discharge of wastes" into those rivers. That is a policy choice that, under the Clean Water Act, Oklahoma is entitled to make and EPA, having reviewed and approved Oklahoma's water quality standards, must now enforce.

Duffryn Terminals, Inc., 720 F. Supp. 1158, 1167 (D.N.J. 1989) (rejecting defendant's contention that no penalty is appropriate absent an adverse impact on the river into which it discharged pollutants), aff'd in part, rev'd on other grounds, 913 F.2d 64 (1990), cert. denied, 111 S.Ct. 1018 (1991); *PIRG of New Jersey* v. *Hercules Inc.*, 29 ERC (BNA) 1417 (D.N.J. 1989) (same); *PIRG of New Jersey* v. *C.P. Chemicals Inc.*, 26 ERC (BNA) 2017, 2021 (D.N.J. 1987) (reducing penalties due to limited or undetectable impact would result in a situation where "any permittee could ignore the requirements of its permit with impunity as long as it discharged into already heavily polluted waters").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

MELINDA KASSEN
ENVIRONMENTAL DEFENSE FUND
1405 Arapahoe
Boulder, CO 80302
(303) 440-4901
Counsel for EDF

JESSICA C. LANDMAN
Counsel of Record
KIMI A. MATSUMOTO
NATURAL RESOURCES DEFENSE COUNCIL
1350 New York Ave., N.W.
Washington, D.C. 20005
(202) 783-7800
Counsel for NRDC

MARK VAN PUTTEN
NATIONAL WILDLIFE FEDERATION
802 Monroe Street
Ann Arbor, MI 48104
(313) 769-3351
Counsel for NWF

JOHN ECHEVERRIA
AMERICAN RIVERS, INC.
801 Pennsylvania Ave., S.E.
Washington, D.C. 20003
(202) 547-6900
Counsel for American Rivers

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